SUPREME COURT, U.S.
FILED
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No. 10-494

In the Supreme Court of the United States

LAWRENCE LITTEN, ET AL,
Petitioners,

v.

GRENADA COUNTY, MISSISSIPPI, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. The trial and appellate courts both correctly found that the ripeness requirement of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), applies to claims of physical takings. The question, as applied in this case, does not involve a genuine dispute between the circuits or a question of broad public interest.

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below:

Plaintiff-Petitioners:

1. Lawrence Litten
2. Fletcher Fly

Defendant-Respondents:

1. Michael Lott
2. Grenada County, Mississippi
3. Yalobusha County, Mississippi

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STATEMENT REGARDING JURISDICTION

The issues presented do not involve a genuine conflict of law or a question of broad public interest.

CONSTITUTIONAL PROVISIONS INVOLVED

Although the Petitioner claims the underlying action includes issues touching upon the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendment to the United States Constitution, the issues presented before this Court concern only the Fifth and Fourteenth Amendments to the United States Constitution, as applied through 42 U.S.C. §1983.

STATEMENT OF THE CASE

On July 17, 2007, Lawrence Litten, (hereinafter referred to as "Litten" or "Petitioner") filed suit against Grenada County, Mississippi and Michael Lott (hereinafter referred to as Respondents), claiming violation of his federal rights under 42 U.S.C. §1983, regarding the public use of Hebron Church Road in Grenada County which ran through portions of property owned by him [R. 8-12]. Litten alleged that Grenada County, Mississippi, through its Board of Supervisors, improperly deemed his private property to be a public road and that he was therefore entitled to damages. [R. 8-12]. Respondents filed an answer specifically denying Litten's claims for relief. [R. 17-24].

Hebron Church Road is a Grenada county public roadway. [R. 155-161]. The road is several miles in length and is a hard surface road averaging about 16

feet in width. [R. 155-161.] It has, for all memory in existence, been a part of the public roadway system of Grenada County. [R. 155-161]. In 2004, the road was identified on the county's registry of roads, which, pursuant to state law, is a public registry of the roadways and rights of ways and uses within the county. [R. 155-161]. Mississippi Code Ann. § 65-7-7 defines the right of way as including the removal of any obstructions to the road.

Litten received the property through a deed which described a "public road" running through the property. [R. 304-312]. In his deposition, Litten conceded that the road was public [R. 304-312].

The Grenada County Tax Assessor has given Litten the benefit of a 50 foot wide right of way for as long as he has owned the property. [R. 155-161]. No objections have ever been made as to the inclusion of Hebron Church Road as a public roadway until the claim which was the beginning of this litigation. [R. 155-161]. Further, the portion of the road which travels through Litten's property has been exempted from his tax during his entire ownership. [R. 155-161]. Grenada County has maintained this road, adding asphalt, cleaning ditches, striping, and generally providing for the safe public access to the road. [R. 155-161].

The litigation filed by Litten in the District Court had its roots in a claim filed by him in July of 2006 that "Grenada County's right to use Hebron Church Road is only by [his] permission and is restricted only to the length and width of the road's pavement, and that Grenada County has no extended right of way from the hard surface of the road for purposes of maintenance." [R. 175-179]

On December 7, 2006, the Grenada County Board of Supervisors considered and denied the claim of Litten and their decision was recorded in the Board of Supervisors minutes. [R. 155-161]. Thereafter, Litten filed a complaint/appeal of this decision in the Circuit Court of Grenada County, Mississippi, Cause No. 2007-019CVM on January 11, 2007, 35 days after the entry of the order of the board of supervisors of Grenada County. An Amended Notice of Appeal was filed on February 28, 2007. [R. 180-184]. The state suit asserted virtually identical facts and theories as are offered in this new Federal claim. [Compare R. 8-12 with R. 180-184]. The state suit was dismissed as untimely under state law. [R. 185].

On October 29, 2007, Respondents filed a Motion to Dismiss in the District Court action based upon the principles or res judicata and collateral estoppel. The District Court denied the motion but found that the only issue remaining was Litten's claim for inverse condemnation. [R. 186-187].

On July 30, 2008, Respondents filed their Motion for Summary Judgment in the District Court, arguing that Litten's sole remaining claim was for federal inverse condemnation and that claim was not yet ripe and even if Litten had any remaining state law claims, they should also be dismissed. [R. 150-154]. On November 14, 2008, the Court granted Summary Judgment in favor of Respondents, finding that "[Litten's] federal inverse condemnation/taking claim is the only jurisdictional basis for this case being brought in federal court and that, by failing to first pursue his remedies in state court, he failed to lay the proper jurisdictional predicate for this action. This

action is therefore due to be dismissed as unripe." [R. 365-369].

The case was dismissed that same day. [R. 370]. Litten's Motion for Reconsideration was denied on May 18, 2009. [R. 391-392]. In that order, the District Court points out:

> If federal jurisdiction in the present context were as broad as plaintiff suggest, then it is likely that federal courts in this state would be inundated with property disputes between Mississippi residents and municipalities. This case is, in fact, a simple property dispute between a Mississippi resident and county, and Mississippi law provides plaintiff with a clear avenue for seeking compensation in this matter. It appears that plaintiff essentially gave up on pursuing this compensation in state court, and having done so, is in no position to assert that he has been deprived of his rights under the U.S. Constitution.

[R. 391-392]

Litten filed a notice of appeal on June 17, 2009. [R. 393]. This case was subsequently consolidated for briefing with *Fletcher Fly v. Yalobusha County*, Case No. 09-60502. On February 23, 2010, the Fifth Circuit Court of Appeals affirmed the grant of summary judgment in both cases.

REASONS FOR DENYING WRIT

Petitioner's request for certiorari rests solely on his claim that the Fifth Circuit Court of Appeals, in its affirmation of the District Court's grant of Summary Judgment, disregarded a dichotomy between regulatory and physical taking under the Fifth Amendment. As will be demonstrated, this assertion is incorrect and ultimately totally irrelevant in determining the status of Litten's claim.

The analysis begins with *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), in which this Court made it abundantly clear that a federal takings claim does not ripen until just compensation is denied. Therefore, for a federal takings claim to become ripe, Litten had to seek compensation through the procedures provided by the state of Mississippi. The procedures outlined in Miss. Code Ann. §11-57-75 were available to Litten and he failed to take advantage of those procedures.

The *Williamson* decision addressed "the question whether federal, state, and local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." *Id.*, at 185. In *Williamson*, this Court found that the underlying jury verdict awarding damages for the taking was not ripe because 1) a final decision had not been obtained as to the extent of the regulation's application to the property, and 2) there had been no attempt to seek compensation through post-deprivation procedures. *Id.*, at 186. "Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulation to its property,

nor utilized the procedure Tennessee provides for obtaining just compensation, respondent's claim is not ripe." *Id.*

The analysis provided by *Williamson* is two-fold. First, an analytical approach must be utilized to determine whether a regulation can be considered a "taking." *Id,.* at 192. Secondly, and critical to Litten's claim, until just compensation has been sought through post-deprivation remedies, the State's action is not "complete in the sense of causing a constitutional injury." *Id.*, at 195. As Litten clearly did not avail himself of the procedures provided for by the state of Mississippi to ensure due process of law, his claim is not ripe and this Petition must be denied.

Prior jurisprudence provides a firm foundation for the *Williamson* decision. "The Fifth Amendment [does not] require that just compensation be paid in advance of, or contemporaneously with the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Id.*, at 194, citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125 (1974) (quoting *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U.S. 641,659, (1890)). See also *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, at 1016 (1984); *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18, 21, (1940); *Hurley v. Kincaid*, 285 U.S. 95, 104, (1932). Therefore, it is clear that until a property owner (such as Litten) has sought out relief through adequate post-deprivation remedies he has not been denied just compensation, and therefore does not have a Fifth Amendment takings claim.

Preseault v. Interstate Commerce Commission et al. 494 U.S. 1 (1990), followed the *Williamson* decision in dealing with a physical taking. In *Preseault*, this Court examined a federal program which converted unused railway lines into hiking trails. *Id.*, at 9. Petitioners in the underlying case owned land adjacent to a railroad right-of-way and sued to quiet title in themselves, arguing that upon the railroad's abandonment the title reverted to them under state property law. *Id.* On appeal, this Court found that the Fifth Amendment does not prohibit takings and, citing *Williamson County,* held "if the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government for a taking.'" *Id., citing Williamson County, supra,* 473 U.S. at 194.

In a subsequent lower court action, *Preseault v. United States,* 100 F.3d 1525 (Fed. Cir. 1996) (hereafter, *Preseault II),* the Federal Circuit Court of Appeals again reviewed the federal program. Citing *Loretto* v. *Teleprompter Manhattan CATV Corp.,* 458 *U.S.* 419 (1982), *the* Court found that "a physical occupation of one's property by the Government, that is, a taking of a recognized property interest, invokes a general expectation of compensation." *Id.,* at 1540, *citing Loretto* v. *Teleprompter Manhattan CATV Corp.,* 458 *U.S.* 419 (1982). A regulatory taking issue arises when a government places restraints on a person's use of their property, while a physical taking issue arises when the government physically occupies the property; "both factually and legally raises significantly different issues." *Id.*

> As the Supreme Court makes clear, these two quite different situations call for quite different analyses. The Government's attempt to read the concept of "reasonable expectations" as used in regulatory takings law into the analysis of a physical occupation case would undermine, if not eviscerate, long-recognized understandings regarding protection of property rights; it is rejected categorically. . .The trial court erred in accepting the Government's effort to inject into the analysis of this physical taking case the question of the owner's "reasonable expectations."

Presault II, at 1540, *citing Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124.

In its decision upholding summary judgment granted by the District Court in this case, the Fifth Circuit Court of Appeals cited *Severance v. Patterson,* 566 F.3d 490,496 (5th Cir. 2009). In *Severance*, the Appellant argued that the rule from *Williamson County* did not apply to physical takings, but only to "regulatory takings." The Fifth Circuit Court of Appeals stated that that such an argument is "foreclosed in this circuit." *Id.*, at 497, *citing Urban Developers LLC v. City of Jackson, Miss.*, 468 F.3d 281, 294-95 (5th Cir. 2006). In their analysis of *Williamson County,* the Fifth Circuit found that there were two prongs for determining whether a claim was ripe under the takings clause:

1) the relevant governmental unit has reached a final decision as to how the regulation will be applied to the landowner, and

2) the plaintiff has sought compensation for the alleged taking through whatever adequate procedures the state provides.

Severance, at 496.

As *Severance* involved a physical taking case, only the second prong was at issue. *Id.* The Appellant argued that even if all takings required exhaustion of post deprivation remedies, she had satisfied that prong, as the procedures under Texas law for seeking compensation were unavailable. *Id.,* at 97. The Fifth Circuit denied this argument, specifically citing the holding in *Williamson County* that the takings claim therein was "premature" due to the petitioner's failure to seek compensation through Tennessee's judicial inverse condemnation procedure." *Id.*

Finally, the Appellant in *Severance* contended that she should not be required to pursue state court litigation, because *Williamson County* required only administrative exhaustion. *Id.* The Fifth Circuit found, however, that her contention was "at odds with multiple decisions of this court that found takings claims unripe when the claimant failed to seek compensation in state courts before filing a federal claim." *Id.*

Contrary to the assertions of the Petitioner regarding a dichotomy between physical and regulatory takings, this Court has made clear that the test used for determining whether a regulatory taking has occurred **should not be applied** when determining whether a physical taking has occurred. *See Keystone Bituminous Coal Ass'n* v. *Debenedictis,* 480 U.S. 470, 517 (1987). "No one, however, would find

any need to employ theses analytical tools where the government has physically taken an identifiable segment of property." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002). "This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking." *Yee* v. *City of Escondido,* 503 U.S. 519, 522, (1992). "The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions." *Id.* Therefore, under these decisions, as there was only a physical taking in this case, there is no conflict on this issue among the Circuits.

The *Williamson County* decision established that there are two prongs for a takings claim brought under 42 U.S.C. § 1983 to be ripe: 1) a final decision by the governmental body as to how the regulation will be applied to the landowner's property must be obtained and 2) an exhaustion of available post-deprivation remedies must not have garnered just compensation for the landowner. The *Preseault* decision applied the *Williamson County* ripeness doctrine to a physical taking. The Appeals Court for the Federal Circuit spoke as to the dichotomy of the regulatory and physical takings, and clearly explained that it is the test devised to determine whether a regulation affects a taking that must not be errantly used in determining whether a government has committed a physical taking. Finally, the Fifth Circuit Court of Appeals conclusively stated in *Severance* (the case relied upon

by the Circuit Court in upholding the District Court's grant of summary judgment) that before a takings claim under the Fifth Amendment is ripe, the second prong of the *Williamson County* test must be satisfied. In a physical takings claim, the claimant must have availed himself of the available post-deprivation remedies and been denied just compensation before a Fifth Amendment takings action arises.

Finally, the decisions in *Tahoe-Sierra*, *Keystone Bituminous Coal Ass'n*, *Yee*, and *Preseault II* make clear that a Court may not use the principles for determining whether a regulatory taking has occurred to answer the question of whether a physical taking has occurred. The different types of government action, either physical occupation or regulation of private use, invoke different types of factual and legal analysis. Before a court can address those issues however, a case must be ripe. The decisions in *Tahoe-Sierra*, *Keystone Bituminous Coal Ass'n*, *Yee*, and *Preseault II* set out the factual and legal analysis to determine whether Litten's claim is ripe. Ripeness applies to all takings cases, temporary or permanent, regulatory or physical, brought under 42 U.S.C. § 1983 and must be answered prior to engaging in any further analysis of whether a government action was a taking. The Fifth Circuit Court of Appeals correctly followed this analysis in its affirmation of the District Court's grant of summary judgment.

In applying the law of these cases to the facts, it is clear that Litten's claim is not ripe and his Petition therefore should not be granted. The roadway which is the basis of Litten's claim has, for all memory in existence, been a part of the public roadway system of Grenada County. [R. 155-161]. In 2004, the road was

specifically identified on the county's public registry of the roadways and rights of ways and uses within the county. [R. 155-161]. Litten cannot claim that he did not know that Hebron Church road was not a public roadway after this identification or that he was not aware of a potential inverse condemnation claim.

In 2004, there was a procedure in place to appeal the Board's decision to adopt the published map which identified the disputed property as a public road. Miss. Code Ann. § 11-57-75 provides that a person aggrieved by a decision of a board of supervisors may appeal to the circuit court of the subject county and that appeal must be filed within ten days from the date the Board of Supervisors rendered such decision. Further, Uniform Circuit and County Court Rule 5.04 permits that appeals from lower tribunals must be filed within 30 days of the entry of the order. No claim or appeal was made by Litten until 2006 when he filed his state court claim. [R.155-161]. Therefore, the claim or appeal made by Litten for a "takings" based claim, such as inverse condemnation, was untimely.

Litten clearly did not avail himself of the procedures provided for by the Mississippi Legislature to ensure due process of law. A procedure for Circuit Court review of a decision of the Board of Supervisors was provided by statute; therefore, there was no taking of the Litten's property without due process of law. The U.S. Supreme Court has "rejected the proposition that 'at a meaningful time and in a meaningful manner' always requires the State to provide a hearing prior to the initial deprivation of property." *Parratt v. Taylor,* 451 U.S. 527, 540 (1981)

Therefore, Litten's takings claims against Grenada County under the Fifth Amendment of the United States Constitution through 42 U.S.C. § 1983 were and remain premature for federal intervention. The District Court was correct in granting summary judgment as to these claims and the Fifth Circuit was correct in upholding that decision.

CONCLUSION

Based on the foregoing arguments, the petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED, this the 15th day of November, 2010.

Defendants, Michael Lott and
Grenada County, Mississippi

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